

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

TREVON BOONE, <i>et al.</i> ,)	CASE NO. 5:20-cv-02128
)	
Plaintiffs,)	JUDGE JOHN R. ADAMS
)	
v.)	<u>DEFENDANT GUARDIAN LIFE</u>
)	<u>INS. CO. OF AMERICA'S</u>
THE GUARDIAN LIFE INS. CO. OF)	<u>MEMORANDUM IN</u>
AMERICA,)	<u>OPPOSITION TO PLAINTIFF'S</u>
)	<u>MOTION IN LIMINE RE:</u>
Defendant.)	<u>REPORT AND OPINIONS OF</u>
)	<u>DR. MICHAEL WELNER</u>

I. Introduction

Defendant The Guardian Life Insurance Co. of America (“Guardian”) agrees that the opinions and report of Plaintiffs¹ expert retained in Summit County Common Pleas Case No. CV-2017-02-0726 (the “Summit County Action”), is hearsay if it is offered for the truth asserted therein. But the fact that that evidence is hearsay in one context does not prevent Guardian from using Dr. Welner’s opinions and report for other purposes. As such, Plaintiffs’ Motion in Limine Re: Report and Opinions of Dr. Michael Welner (“Motion”) must be denied.

II. Law and Analysis

Evidence is only hearsay evidence if it is an out of court statement offered in evidence to prove the truth of the matter asserted in the statement. Fed. R. Evid. 801(c). Therefore, by definition, if an out of court statement is offered for some purpose other than to prove the truth of

¹ Plaintiffs consist of Trevor M. Boone, Dejon X. Newell, and Anne Piero Silagy, in her capacity as Guardian of the Estate of TDJ.

the matter asserted therein, then that statement is not hearsay, and is not barred by the rule against hearsay.

There are several non-hearsay reasons to offer Dr. Welner's opinions and report. The fact that the opinions and report exist is not hearsay. *See, e.g., Tremont LLC v. Halliburton Energy Servs.*, 696 F. Supp. 2d 741, 752 n.8 (S.D. Tex. 2010). The opinions and reports can be offered as background. *See, e.g., United States v. Pedroza*, 750 F.2d 187, 200 (2d Cir. 1984) (finding out of court statements admissible "not as proof of the truth of the matters asserted but rather to show the circumstances surrounding the events, providing explanation for such matters as the understanding or intent with which certain acts were performed"). And the opinions and report may be used for impeachment.

Plaintiffs raise two specific objections in their motion. First, they state it was impermissible for Guardian to provide Guardian's expert, Dr. Ralston, with Dr. Welner's report from the Summit County Action. But Fed. R. Evid. 703 permits an expert to rely on hearsay materials. *See Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 729 (6th Cir. 1994) (noting hearsay evidence may be admitted to explain the basis of the expert's opinion). And Dr. Ralston is free to testify as to the materials he reviewed, so long as that testimony relates to the bases for his opinions. *Id.* Thus, Plaintiffs' first objection has no support in the law.

Next, Plaintiffs anticipate that Guardian may cross-examine Plaintiffs' experts with Dr. Welner's report and ask if they agree or disagree with him. By definition, this act is not hearsay because it Guardian would not be seeking to offer Dr. Welner's report for the truth asserted therein; the testimony instead goes to Plaintiffs' experts' credibility. As such, the testimony elicited by Dr. Welner's report is permissible, and Plaintiffs' second objection has no support in the law.

Finally, there is no risk of confusing or misleading the jury when Dr. Welner's opinions and report are used for non-hearsay purposes. The Court can instruct the jury as to how to use that evidence. And the evidence will be helpful to the jury, as it will help the jury evaluate Plaintiffs' expert witness testimony.

III. Conclusion

For the foregoing reasons, Guardian respectfully requests the Court deny Plaintiffs' Motion.

Respectfully submitted,

/s/ Tracey L. Turnbull

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CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2021 a copy of Defendant Guardian Life Insurance Company's Opposition to Plaintiff's Motion in Limine Re: Report and Opinions of Dr. Michael Welner was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties have been served by regular U.S. mail. Parties may access this filing through the Court's system.

/s/ Tracey L. Turnbull

One of the Attorneys for Defendant The
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